

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
N.T.J. LIQUORS, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1982	:	
through August 31, 1985.	:	

Petitioner, N.T.J. Liquors, Inc., 1304 East Gun Hill Road, Bronx, New York 10469, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1982 through August 31, 1985 (File No. 805488).

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on August 1, 1990 at 1:15 P.M. with all briefs due by October 17, 1990. Petitioner appeared by Stillman & Spiegel, P.C. (Daniel Chavez, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Angelo Scopellito, Esq., of counsel).

ISSUE

Whether representations by an Assistant District Attorney as to the amount of tax due made during a court hearing where petitioner pled guilty to offering a false instrument for filing are binding to supersede a previously issued notice of determination of taxes due in a higher amount.

FINDINGS OF FACT

(a) A consent extending the limitation period for assessment for the taxable period June 1, 1982 through November 30, 1985 to December 20, 1986 had been executed by petitioner, N.T.J. Liquors, Inc., on May 13, 1986.

(b) The Division of Taxation issued a Notice of Determination and Demand for

Payment of Sales and Use Taxes Due to petitioner on December 15, 1986 for the period September 1, 1982 through August 31, 1985 for tax due of \$35,924.00, a fraud penalty under Tax Law § 1145(a)(2) of \$17,965.00 and interest of \$13,153.84, for a total amount due of \$67,042.84.

(a) Petitioner, on March 9, 1987, pled guilty to the crime of offering a false instrument for filing in the second degree under Penal Law § 175.30¹ and was sentenced to make payments of \$48,707.56 to the Bronx County District Attorney's Office.

(b) At this March 9, 1987 hearing, the New York State Department of Taxation and Finance appeared by Dennis K. Spillane, Chief Attorney, Tax Enforcement.

(c) During the hearing, the Assistant District Attorney, Mr. Kessler, stated as follows:

"Finally, concerning NTJ Liquors, Inc., between September 1, 1982 and August 31st of 1985, the defendant did knowingly file false sales and use tax returns with the New York State Department of Tax in that they knowingly falsely reported their gross sales and taxable sales, the amount which the corporation failed to report was twenty-five thousand five hundred and seventy-two dollars and sixty-four cents. Together with interest and penalties, the figure now owed to the State of New York is forty-eight thousand seven hundred and seven dollars and fifty-six cents.

Again, it has been agreed upon that the full amount is to be paid. The amount having been computed by the State of New York and confirmed by the defendant and will be paid to the State through the District Attorney's office under the State Forfeiture Act in five equal and annual payments."

He further stated:

"As per the agreement, the People recommend full restitution on the part of the defendants...."

(d) Mr. Kessler also stated:

"Again, as with the other defendants, it is understood that this plea covers all criminal proceedings and charges and does not reflect any civil liabilities, if any, owed by the defendant to the appropriate authorities."

CONCLUSIONS OF LAW

A. The Division of Taxation must be held bound by the representations of the Assistant

¹It is noted that during such criminal proceeding reference was also incorrectly made to section 170.30 of the Penal Law.

District Attorney and the assessment must accordingly be found to be satisfied. The Division argues that it is not so bound since the Tax Appeals Tribunal has held to the contrary in Matter of Dallacqua (March 2, 1989). In that case, however, the Tribunal stated:

"we find nothing here to indicate that the plea represented the totality of petitioner's tax liability or that the Division was precluded from assessing sales tax liability."

In fact, the statements at the plea hearing in that case make it clear that the Attorney General reserved the right at a later time to advise the court of the amount of taxes due.

In this case, in contrast, the Assistant District Attorney made an express statement that "the figure now owed to the State of New York is \$48,707.56" and further stated that this figure was computed by the State. These statements were in the presence of the Chief Attorney for Tax Enforcement of the Department of Taxation and Finance, and if there were any reservations as to the amount due, candor at least would have demanded a clear statement to that effect on the record.

As the Division of Taxation can offer no explanation of the reason for the difference in the amounts of tax stated in the notice and in the plea bargain, I can only assume that there had been a reduction in the determination prior to the plea bargain.

B. The petition of N.T.J. Liquors, Inc. is granted, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due is cancelled.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE